

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

SHAWN HAWK, No. CIV S-04-0731-MCE-CMK-P
Plaintiff,

FINDINGS AND RECOMMENDATIONS

ALAMEIDA, et al.,

Defendants.

Plaintiff, a state prisoner proceeding pro se, brings this civil rights action pursuant to 42 U.S.C. § 1983.

On June 23, 2006, the court directed the United States Marshal to serve process on defendant Howard. On September 18, 2006, the Marshal returned service unexecuted because defendant Howard is deceased. In light of the suggestion on the record of defendant Howard's death, on September 26, 1996, the court directed plaintiff to seek substitution pursuant to Federal Rule of Civil Procedure 25(a)(1) within 90 days of the date of the order. Plaintiff was cautioned that failure to seek substitution would result in dismissal of the action as against defendant Howard. More than 90 days have expired and plaintiff has not sought substitution.

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1 Federal Rule of Civil Procedure 25(a)(1) provides, in pertinent part: "Unless the
2 motion for substitution is made not later than 90 days after the death is suggested upon the
3 record by service of a statement of the fact of the death as provided herein . . . , the action shall
4 be dismissed as to the deceased party." This language is mandatory in that dismissal is required
5 where no timely motion for substitution is made. Because plaintiff has not sought substitution of
6 defendant Howard within the 90-day period, dismissal of the action as against defendant Howard
7 is required by the rules.

8 Based on the foregoing, the undersigned recommends that this action be
9 dismissed as against defendant Howard only and that the Clerk of the Court be directed to
10 terminate Howard as a defendant to this action.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 20 days
13 after being served with these findings and recommendations, any party may file written
14 objections with the court. The document should be captioned "Objections to Magistrate Judge's
15 Findings and Recommendations." Failure to file objections within the specified time may waive
16 the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

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18 DATED: February 15, 2007.

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21 CRAIG M. KELLISON
22 UNITED STATES MAGISTRATE JUDGE
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